NO. 20949

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIS A. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Willis A. Smith, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on January 26, 1966 [C. T. 2]. 1/ The indictment was brought under 21 U. S. C. §174, and charged that the appellant unlawfully concealed and sold 22.985 grams of heroin which had been imported into the United States of American contrary to law.

Appellant pleaded not guilty and the case proceeded to trial

1/ C. T. refers to Clerk's Transcript of Record.

before the Honorable Irving Hill. On February 25, 1966, appellant was found guilty on both counts of the indictment by the jury [C. T. 44].

On March 25, 1966, appellant was sentenced to serve a period of twelve years.

Appellant's Notice of Appeal was timely filed [C. T. 56].

The jurisdiction of the District Court was based on Title 21, United States Code, §174, and Title 18, United States Code, §3231, and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, §§ 1291 and 1294, and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 21, United States Code, §174, provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to

commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTIONS PRESENTED

A. Did the Trial Court Err in Not Compelling the Government to Disclose the Name of the Informant Prior to the Time the Government Did in Fact Present Appellant with the Informant's Name?

B. Did the Court Err in Not Granting Appellant's Counsel a Greater Amount of Time in Which to Interview the Informant?

C. Was the Court's Alibi Instruction Within the Discretion Granted to a District Judge?

D. Was Appellant Denied His Right to the Assistance of Effective Counsel?

IV

STATEMENT OF FACTS

On September 2, 1965, at approximately 1:30 P.M., a meeting was held in the office of the Federal Bureau of Narcotics in Los Angeles [R. T. 60]. [2] Present at the meeting, among others, were Agent Chris V. Saiz and an informant, Richard Abelar. At approximately 2:30 P.M., Agent Saiz and the informant left the office and drove to the informant's residence in Culver City [R. T. 62]. Upon arrival at the informant's residence a phone call was made to 398-1971, the phone number of the appellant, Willis A. Smith [R. T. 62]. A meeting was arranged whereby the informant could purchase heroin from the appellant.

Thereafter Agent Saiz, accompanied by the informant Abelar, drove to the parking lot of the Thriftimart Market located on Centinela Boulevard [R. T. 63], arriving at approximately 4:05 P.M. [R. T. 64]. Upon arrival in the parking lot Agent Saiz searched the informant for any narcotics or money with a negative result. Saiz then gave the informant a white envelope containing $850.00 [R. T. 64].

Shortly thereafter appellant arrived driving a red 1955 or 1956 Jaguar and parked two parking spaces away from the vehicle Saiz and the informant were parked in [R. T. 65]. Prior to his arrvial in the Thriftimart Market appellant had been seen leaving his residence at 3736 Inglewood Boulevard by Agent Restow. Agent

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2/ R. T. refers to Reporter's Transcript of the trial.

Restow initially observed appellant through high-powered binoculars and then followed him to the parking lot of the Thriftimart Market.

After appellant's arrival in the parking lot the informant Abelar exited his vehicle and walked over to appellant's car. Abelar proceeded to hand appellant the envelope containing $850.00 and received in return approximately one ounce of heroin [R. T. 65, 66].

After the transaction had been completed appellant drove out of the parking lot and passed within ten feet of Agent Westrate who had been conducting a foot surveillance [R. T. 94, 95]. Agent Westrate then entered a Government vehicle and followed appellant back to his place of residence at 3736 Inglewood Boulevard [R. T. 96, 97].

ARGUMENT

I

THERE WAS NO ERROR IN THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A BILL OF PARTICULARS IN THAT THE NAME OF THE INFORMANT WAS DISCLOSED TWO DAYS PRIOR TO TRIAL.

Appellant argues that the trial court committed error in denying his motion for a bill of particulars and refusing to compel the Government to disclose the name of the informant Abelar prior to trial. The facts surrounding the disclosure of the informant's identity indicate clearly that appellant was advised of the informant's

identity some two and one-half days prior to trial and thus the appellant was in no way disadvantaged by the initial denial of the motion for a bill of particulars.

On Wednesday, February 16, 1966, appellant was supplied with the date, time and place of the transaction alleged in the two-count indictment [R. T. 28, Vol. A]. At the same time the Government agreed to furnish appellant with the name of the informant and to have him available at the time of trial [R. T. 31, Vol. A]. The Government did, however, refuse to disclose the name of the informant at that time.

On the following Monday, February 21, 1966, two and one-half days prior to trial, appellant was given the name of the informant [R. T. 50]. Appellant was also notified that the informant was in custody and that he would be available for interviewing [R. T. 49]. This was two and one-half days prior to the commencement of the trial. During this period counsel for appellant had ample "opportunity" to examine Richard Abelar with respect to any matters pertinent to the preparation of an adequate defense. However, appellant's trial counsel indicated that informant Abelar was not "ready" to discuss his position in detail with appellant's counsel on the occasions when appellant's counsel visited him in jail prior to the commencement of trial [see appellant's brief, p. vii].

Appellants rely on the leading case of Roviaro v. United States, 353 U.S. 53 (1957), in support of their contention that the name of the informant should have been supplied in response to the

request of the bill of particulars. However, appellee contends that neither the holding of Roviaro nor the principles underlying that decision necessarily require the pre-trial disclosure of an informant's identity in the instant case.

The Roviaro holding respecting the disclosure of the identity of a Government informant is not a rule which was meant to be binding on trial courts regardless of the circumstances of a given case. As was stated by the court in the Roviaro decision:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."
> Roviaro v. United States, supra, at p. 62.

Thus it is apparent that the fundamental principles of fairness to the accused respecting his right to adequately prepare his defense must be examined on a case-by-case basis. The decision as to whether to disclose the informant's name and if so, at what time, must be judged in light of fairness to the accused and all of the special considerations attendant a given case.

In Roviaro the informer was the only witness in a position to amplify or contradict the testimony of the Government witnesses. Roviaro v. United States, supra, at p. 64. Clearly a pre-trial disclosure of the informant's identity was crucial in those circumstances; it could have provided the name of a man who would possibly have been the "sole" witness for the defense. In the case at bar, however, defense counsel had numerous alibi witnesses who were in a position to amplify or contradict the testimony of the Government witnesses. These witnesses would and did in fact testify that the appellant was at a party in their presence at the time of the alleged sale of heroin. Thus appellant was not faced with the same difficulty as was Roviaro whose sole potential witness could neither be identified or located.

Appellant relies on footnote 15 in the Roviaro case as authority requiring the trial court to compel the Government to disclose the identity of the informant upon the filing of the motion for a bill of particulars. Footnote 15 was not argued by counsel in Roviaro and was not necessary to the holding. Furthermore, although it did indicate the Court's position as to that issue under the particular circumstances of Roviaro it must be read in light of the clearly enunciated rationale that the issue as to disclosure of an informant's identity must be subjected to a case-by-case scrutiny by trial courts. As was stated by the Supreme Court as recently as March of 1967:

"What Roviaro thus makes clear is that this Court was unwilling to impose any absolute rule

requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials." McCray v. Illinois, 18 L. Ed. 2d 62, 70 (1967). See also Jenks v. United States, 353 U.S. 657 (1957).

An examination of the record in the case at bar indicates that even if it was error to fail to disclose the name of the informer mentioned in Count Two of the indictment at the time of the filing of the motion for a bill of particulars, this error, if such it was, was cured by the Government's disclosure of the name of the informant on the following Monday, two and one-half days prior to the commencement of trial and but four days after the motion had been denied. Since the fact sought to be elicited was disclosed so soon after the denial the error was a harmless one. Sorrentino v. United States, 163 F. 2d 627 (9 Cir. 1947).

Finally, it must be noted that not only was appellant advised of the identity of the informant Abelar two and one-half days prior to trial, but the informant subsequently took the stand during the trial and testified, perjuriously as the jury found, that the appellant was not the man from whom he had purchased the heroin as charged in the indictment [R. T. 136]. Thus appellant had the full advantage of the informant Abelar's testimony for whatever it was worth and should not now be heard to complain that he was prejudiced by not having the informant's name four days earlier. This is especially true, since appellant's brief clearly indicates that as late as two

days prior to trial Abelar "would only remark that he was undecided whether to testify for the Government or to keep silent" (Appellant's brief, p. vii).

II

APPELLANT WAS GRANTED ALL THE TIME WHICH HE REQUESTED TO DISCUSS THE INFORMER'S TESTIMONY

Appellant contends that he was unduly prejudiced by the amount of time he was given in which to interview the informant after he received word that the informer wished to testify for the defense. Appellant's trial counsel had, of course, interviewed the informant in jail prior to trial at which time the informant apparently was undecided as to whether he would remain silent or testify for the Government.

The record nowhere indicates that appellant's trial counsel was in any way curtailed in the amount of time he needed to interview the informant. After trial counsel was made aware that the informant was desirous of testifying for the defense the record discloses the following:

> "MR. GRAY: Yes, Your Honor, I do. I would like just a moment or so to go to the fifth floor and to talk to the informant. He has been in custody, and I haven't had an opportunity to talk with him. This morning he was in the hallway when he was down here, when he was first brought here, and he stated he would

like to talk to me. And I would like to talk to him."

* * * * *

"THE COURT: How long will you need to talk with this gentleman?

"MR. GRAY: Just a very short period, Your Honor." [R. T. 127].

* * * * *

"THE COURT: Call your next witness.

"MR. GRAY: My next witness is not here yet.

"THE MARSHAL: I believe he is out in the hall.

"THE COURT: Do you need a brief recess?

"MR. GRAY: Yes.

"THE COURT: How long?

"MR. GRAY: Five minutes." [R. T. 133].

After the five minute recess, appellant's trial counsel proceeded to call the informant to the stand [R. T. 134]. In no way did he indicate that he needed any more time in which to interview the informant. Indeed the record is clear that appellant's trial counsel requested but a five minute recess and Judge Hill complied with that request. Trial counsel's unarticulated desire for more time was never communicated to the trial court and surely cannot be considered by this Court in any way.

Finally, it is clear that appellant received the full benefit of the informant's testimony, such as it was, when the informant

testified that appellant was not the man from whom he had purchased the heroin charged in the indictment [R. T. 136].

III

THE COURT'S SPECIAL INSTRUCTION ON ALIBI WITNESSES WAS PROPER.

In his charge to the jury Judge Hill gave the following special instruction on alibi witnesses:

> "In this case there is a direct factual contradiction in the testimony of two groups of witnesses on this question of alibi. The defendant has offered evidence of an alibi and his eye witnesses, if believed, state that he did not leave his house until 5:30 P. M. on the day in question. The government has offered testimony of eye witnesses which, if believed, indicates that the defendant left his house earlier that afternoon and proceeded to the Thrift Mart parking lot. You have to resolve that conflict. In so doing, ladies and gentlemen, bear in mind and carefully scrutinize the character of the witnesses on both sides, their positions during the periods involved, their experience, if any, in observation, and all of the other factors which I have mentioned to you before which you must consider in weighing a witness's testimony.

"Among other factors, you may bear in mind the testimony of one witness that there were sixteen people in this house during at least some of the period in question and the difficulty of anyone observing and keeping track of the movements and actions of that many persons at all times." [R. T. 222, 223].

Judge Hill's special instruction on alibi witnesses was not prejudicial and was within his power to comment on the evidence. "That trial judges of the United States Courts have authority to comment on the evidence in their instructions is so well established as to require no citation of authority." Jones v. United States, 361 F.2d 537, 540 (D. C. C. A. 1966); Shaw v. United States, 244 F.2d 930 (9 Cir. 1957). Judges of a Federal Court are not only permitted to instruct the jury on the facts, but also to comment on the credibility of witnesses. Bernal-Zazueta v. United States, 225 F.2d 60, 62 (9 Cir. 1955); Kravitz v. United States, 281 F.2d 581 (3 Cir. 1960), cert. denied 364 U.S. 941. A judge is free not only to give his impressions of the witnesses but to point out the rational implications of the evidence. United States v. Frankel, 65 F.2d 285 (2 Cir. 1933).

Considerable latitude is permitted to a judge with respect to instructions and comment on the evidence. "The trial judge may always comment in his charge to the jury concerning facts on matters of common knowledge or facts of which judicial notice may be taken, where the comment is applicable to the subject

matter before it." Lake v. United States, 302 F.2d 452 (8 Cir. 1962). In the case at bar, Judge Hill's remark concerning the difficulty of observing an individual's activity at a party was such a comment. The judge's comment here reflects an awareness of the proper role he is to play, "that a federal judge in a criminal case is more than a mere moderator, he may assist the jury in arriving at a just conclusion by explaining and commenting on the evidence, and by expressing his opinion upon the facts. . . . A judge may analyze and dissect the evidence so long as he does not distort it or add to it!" Querua v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L.Ed. 1321 (1933). Clearly the court's alibi instruction was within the discretion granted to a district judge.

IV

APPELLANT WAS PROVIDED WITH THE ASSISTANCE OF CAPABLE AND VIGOROUS COUNSEL WHO FULLY PROTECTED APPELLANT'S RIGHTS.

Appellant sets forth two alleged errors committed by counsel during the trial as the basis for his claim that he was denied his constitutional right to the assistance of effective counsel.

The basic test in this circuit regarding the adequacy of counsel in set forth in Bouchard v. United States, 344 F.2d 872, 874 (9 Cir. 1965). To show that trial counsel was incompetent an appellant must show that counsel was so "incompetent or

inefficient to make the trial a farce or mockery of justice".

Due process certainly does not require "errorless counsel and not counsel judged ineffective by hindsight, but rather counsel reasonably likely to render and rendering reasonably effective assistance". Brubaker v. Dickson, 310 F.2d 30, 37 (9 Cir. 1962).

Appellant sets forth as trial counsel's first error the fact that he failed to challenge several jurors at the request of appellant. The record nowhere indicates that appellant personally urged his trial counsel to strike the veniremen complained of. Even assuming, arguendo, that appellant did request his trial counsel to excuse the three veniremen it is settled that an indigent accused has; --

> " . . . a right to be cautioned, advised and served by counsel so that he will not be the victim of his poverty. But he has no right to continuous service, nor to counsel of his choice, nor to dictate the procedural course of his representation." Rogers v. United States, 325 F.2d 485 (10 Cir. 1963).

Appellant also contends that trial counsel committed error in failing to move to dismiss after the informant testified on behalf of the defense "on the grounds that the Court could not determine that sufficient evidence existed to permit the jury to find defendant guilty beyond a reasonable doubt".

Appellant fails to grasp the true function of a motion to dismiss. Under Rule 12(b) of the Federal Rules of Criminal

Procedure a motion to dismiss will lie prior to trial based upon defects in the accusation or in the institution of the prosecution. Any motion directed to the sufficiency of the evidence would have to be made pursuant to Rule 29, Federal Rules of Criminal Procedure, and should be made appropriately either at the conclusion of the Government's case or at the conclusion of all of the evidence. This is the proper vehicle with which to challenge the sufficiency of the evidence.

Trial counsel properly failed to move to dismiss after the informant had testified because no such motion is cognizable in the Federal Courts. The import of the informant's testimony was to present a question of credibility and a question of fact which properly were sent to the jury for their determination.

Finally, appellant claims that trial counsel erred in giving late notice of a motion for bail pending appeal. This motion was made after the verdict of the jury had been returned and is in no way relevant to trial counsel's efficiency and ability at trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman
ANTHONY MICHAEL GLASSMAN